Date: 20150129

Files: 560-02-086
and 566-02-8064 to 8067

Citation: 2015 PSLREB 12

Public Service Labour Relations Act and *Canada Labour Code*

Before a panel of the Public Service Labour Relations Board and an adjudicator

BETWEEN

PETER TATICEK

Complainant and Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent and Employer

Indexed as
Taticek v. Treasury Board (Canada Border Services Agency)

In the matter of a complaint made under section 133 of the *Canada Labour Code* and grievances referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations Board and adjudicator

For the Complainant and Grievor: Dejan Toncic, Professional Institute of the Public Service of Canada

For the Respondent and Employer: Christine Diguer, counsel

Heard at Ottawa, Ontario,
February 19 to 21, 2014.
(Written submissions filed dated July 25, August 25 and September 9, 2014.)

I. Complaint before the Board and individual grievances referred to adjudication

[1] The grievor, Peter Taticek, filed a series of grievances alleging that the employer, the Canada Border Services Agency (CBSA), failed to conduct an ergonomic assessment required to facilitate his work, failed to accommodate him in accordance with his doctor's restrictions, discriminated against him by failing to accommodate him pursuant to his doctor's recommendations and deployed him to another position without his consent in a situation in which it was required. In addition, Mr. Taticek filed a complaint under section 133 of the *Canada Labour Code* (R.S.C. 1985, c. L-2; "the *CLC*") alleging that he had been disciplined by the employer, contrary to section 147 of the *CLC*. For ease of reference, Mr. Taticek will be referred to throughout this decision as "the grievor." The employer and respondent will be referred to as "the employer."

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act*, No. 2 (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s.2) as that *Act* read immediately before that day. In other words, the Board is now performing the functions were previously exercised by the Public Service Labour Relations Board.

II. Summary of the evidence

[3] The grievor joined the CBSA in 2007 in the information technology (IT) area. In September 2011, as part of a return-to-work program, he joined the Customs Commercial Systems (CCS) group. His role was to support the CCS and conduct various assessments and evaluations of the employer's computer system. Previous to that, he worked in the border crossing system for commercial traffic (ACROSS) as a project coordinator. While with ACROSS, he was responsible for the testing and scheduling of updates to the system. In this role, he was allowed to work from his home on occasion.

His role with ACROSS was completely different from his role with the CCS; he is a technical analyst, not a programmer.

[4] In November 2010, the grievor's physician directed that he cease working until such time as changes were made regarding his workplace that would accommodate his disability and enable him to work again. The grievor was therefore out of the workplace from December 8, 2010, until September 2011, when he returned to the workplace.

[5] Despite clarification provided by the grievor's doctor at the employer's request, the grievor remained off work until September 2011, even though he was able to return to work in May 2011. One of the conditions of his return to work was that he be removed from the ACROSS team. He provided his director general, Pierre Ferland, with a copy of his resume and identified the names of managers and areas where he was interested in working.

[6] In April or May of 2011, the long-term disability insurance carrier, Sun Life, advised the grievor that since he was cleared to return to work in May, it was considering closing his claim, which would have left him without an income. According to Sun Life, the question of whether or not the employer was cooperating with the grievor's return to work had no bearing on its decision. Regardless, Sun Life contacted the employer to initiate the development of a return-to-work plan.

[7] The grievor first learned of his move to the CCS at his return-to-work meeting, when he was advised that upon his return, he was to report there. In addition to the change in work team, the grievor required certain ergonomic changes to his cubicle, in accordance with an ergonomic assessment, which was done in 2009. These changes required a specific chair and keyboard and dual monitors. The assessment was done in his cubicle at 250 Tremblay Road in Ottawa, Ontario, and was workspace specific.

[8] From his return to work, the grievor was relocated four times in eight months. None of the cubicles to which he was assigned was identical to the configuration and size of the cubicle he occupied at the Tremblay Road location. With each move, equipment went missing, so not only were the new cubicles not set up to meet his needs in accordance with the ergonomic assessment, but also the equipment he required was often missing.

[9] The grievor raised his concerns with the employer and his doctor that the employer was not providing him the same accommodations that he had had at Tremblay Road. The employer advised him that if the missing equipment could not be located, it would have to be replaced. Prior to the start of his return-to-work program, his doctor requested an updated ergonomic assessment be conducted in his new cubicle.

[10] Sun Life and his doctor formulated a return-to-work program for the grievor, which included time frames. Sun life submitted the plan to the employer in September 2011. At the grievor's request, Sun Life was the employer's point of contact to discuss the plan. The employer merged the Sun Life plan into a plan of its own (Exhibit 1, tab 10). The plan was partially implemented; the grievor was moved to another work team and location.

[11] The problems with the type of work to which the grievor was assigned were not addressed. He felt that he had been assigned to a dead-end job that was not a match for his interests or skill sets. The new job was not a match that would create a successful reintegration for him to the workplace.

[12] The grievor insists that he raised his concerns with the employer at meetings with his managers and Mr. Ferland. He disagreed with the choice of work assignment and expressed as much. He was wary of the employer's intention but maintains that he was not insubordinate or non-cooperative. In his opinion, the new assignment should have been temporary until a position at his level became available that was more suited to his skill sets and interests.

[13] The grievor expressed his concerns to his manager and director at a meeting with representatives from the employer's labour relations division and his bargaining agent representative. He also pointed out that mutual agreement was required for a successful return to work. Despite this, he was threatened with disciplinary action if he did not contact his manager about his new assignment. His position number and funding on the ACROSS team were being transferred to the CCS. He assumed it meant that he would be performing the same duties and that he would have the same roles and responsibilities at the CCS as he had had while on the ACROSS team. In fact, it was a different job and it had different roles and responsibilities with a different manager. This position did not reflect the work that he was performing when he left the workplace on December 8, 2010. When he asked for a job description, he was provided

with a Canada Customs and Revenue Agency job description, which indicated that he worked for the Canada Revenue Agency. This constituted a deployment in the grievor's opinion for which he had not given his consent.

[14] The grievor discussed with his manager, Beverly Ifill, the requirements of his 2009 ergonomic assessment that went missing as he was moved from cubicle to cubicle. His doctor also sent reminders of the requirements on a continuous basis. The fact that his concerns were not addressed was unsettling for the grievor and made it difficult for him to reintegrate. His aggravation with his new assignment was compounded by his ill-suited cubicle and ongoing accommodation issues. He was advised that despite the 2009 ergonomic assessment, the employer was advised by labour relations not to provide him a second monitor. This shocked the grievor as he had had a dual monitor setup when he left in 2010. In his opinion, it would not impose an undue hardship on the employer for it to provide him with a second monitor. Eventually, it was provided.

[15] From the commencement of his return to work, the grievor questioned his suitability for the position with the CCS team. He engaged his bargaining agent representatives and wrote to the employer's vice-president of human resources (VPHR) to discuss his displeasure with his assignment. Eventually, the bargaining agent was successful in arranging a meeting to discuss the grievor's issues with his return-to-work and accommodation situation.

[16] When Virginie Martel-Charest, a labour relations advisor employed by the CBSA, found out about the grievor's intentions to meet with the CBSA's VPHR, she sent an email to several colleagues under the heading, "Update: critical information" (Exhibit 1, tab 15). In it, she referred to the grievor under the pseudonym "Musketeer T." When he received a copy of the email via an access to information request, the grievor was shocked and insulted by how labour relations had referred to him. It was offensive and caused him to question the employer's desire to reintegrate him into the workplace.

[17] He maintains that the use of the term "Musketeer T." demonstrated the employer's bias against the grievor. It was used recurrently, including in communications with Health Canada (Exhibit 1, tab 16). During the entire return-to-work period, Ms. Martel-Charest advised CBSA management and frequently referred to "musketeer" and Musketeer T. (see Exhibit 1, tab 18) in internal and external email communications. Beverley Boyd, whom the VPHR assigned to resolve the issues related

to the grievor's return to work, was also among those who received emails in which the musketeer references were made. The grievor submits that these references demonstrated that the employer did not actually help him work towards meeting his accommodation needs.

[18] The grievor eventually asked to work from home until the issue with his cubicle location and fit-out was resolved. He had been allowed to work from home before his sick leave in 2010. This request was initially refused but was eventually granted when the grievor's doctor suggested it (Exhibit 1, tab 21).

[19] However, when the grievor went to the employer's Tremblay Road location to pick up a laptop that Ms. Ifill was having configured for him, in the summer of 2011, he was required to wait for two hours and was finally advised that labour relations would not allow him to work from home. Eventually, he received an email from Ms. Ifill (Exhibit 1, tab 23), indicating that there was insufficient information in his doctor's note to support his request to work from home.

[20] This email also stated that regardless of the fact that all the grievor's ergonomic needs had been met, the employer agreed to have an updated ergonomic assessment of his workspace done, which occurred in May 2012 (Exhibit 1, tab 13). Although initially scheduled for May 9, 2012, it did not occur until May 22, 2012, due to the grievor's absence from work.

[21] The grievor was then moved from the cubicle where the assessment had been conducted to a cubicle that was laid out differently. Discussions between the grievor and the CBSA's accommodations section to secure a cubicle with the same layout as the one he had occupied in May 2012 were unsuccessful. He required a cubicle that allowed him the privacy to open his shirt when using a TENS machine to treat his back pain.

[22] When the grievor was moved to the new cubicle in June 2012, his equipment was not there, and the cubicle's setup did not comply with the occupational therapist's recommendations. Believing that this posed an occupational health and safety threat to him, the grievor advised Ron Easey, the CBSA's occupational health and safety advisor for the National Capital Region, that he was exercising his rights under subsection 129(1) of the *CLC* to refuse unsafe work. His refusal to work lasted three weeks.

[23] When he returned to work, the grievor was assigned to a cubicle on the seventh floor of 171 Slater Street, which had been retrofitted to suit his needs. The new equipment was ordered, although it did not arrive until about a month later. While the grievor was exercising his right to refuse to work, the employer was in discussions with the bargaining agent. It was the employer's opinion that the grievor had abandoned his position. In the end, the grievor's time out of the workplace related to his work refusal was coded for pay purposes as leave with pay for other reasons at the final level of the grievance process.

[24] By the fall of 2012, all the grievor's ergonomic issues had been addressed, which left the issue of his objection to the CCS position, which, in his opinion, was a forced deployment. When he signed the return-to-work agreement, the grievor did not agree to a deployment. He accepted the CCS position to avoid being without an income. In his opinion, the employer was still obligated to find him a suitable position. The employer made no efforts to look beyond the CBSA to find him a suitable position. In April 2012, the grievor sent the employer an updated resume and identified potential areas of interest, yet he was not contacted about any vacancies. He was left to manage his own career, despite having been told by Ms. Ifill during his annual performance review that his skill sets were not a fit for her team.

[25] The employer maintains, however, that the move to the CCS positon complied with all the requirements in the grievor's medical certificates. Mr. Ferland is Director General, Solutions Directorate, a division of the CBSA's IT Branch, which is responsible for the CCS division to which the grievor was assigned. The grievor delivered the medical notes (Exhibit 3, tabs 3 and 4) to Mr. Ferland directly. Exhibit 3, tab 4, was intended to replace Exhibit 3, tab 3. The medical certificates, dated November 10, 2010, and November 25, 2010, indicated that the grievor should be moved to a different work environment with a different reporting structure.

[26] In November 2010, two significant events happened: the implementation of a $60 million rewrite of the ACROSS program at a time that is historically the busiest of the year for commercial traffic, and the CBSA's receipt of a notification to be on the lookout for explosives being shipped from Yemen. The CBSA knew that it was going live with the new release at a time when the commercial system could not be taken off-line because of this threat. No one involved in the project was operating under a normal level of stress.

[27] Mr. Ferland was aware of complaints emanating from the 6th floor of 250 Tremblay Road, where the grievor worked, when he joined the organization in February 2010. He knew he was facing a redesign of the operations, and he required new leadership, in the form of Marc Pitre and Ms. Ifill. Before he could complete his plans, the events of November 2010 occurred. The lack of leadership demonstrated by the acting director of the day contributed to the perfect storm. Mr. Ferland believed the grievor's requests to be assigned to a different work environment with a different working structure to be a direct result of the November events and the manager's lack of leadership.

[28] Mr. Ferland was also aware of the musketeer reference used by Ms. Martel-Charest and was concerned. In his opinion, that type of communication was inappropriate and unprofessional. He hired a coach for Ms. Martel-Charest to help her improve her labour relations and communication skills.

[29] In December 2010 following the events of November 2010, the grievor brought in two medical notes from his physician stating that he required certain accommodations including movement to a new team. The acting manager of ACROSS sought clarification from the grievor's physician as to why two different doctor's notes were provided and information on the grievor's fitness to work. The employer was trying to understand the true nature of the grievor's problems and what he needed by way of accommodations. This request was made on December 6, 2010, and the grievor went on medical leave on December 8, 2010.

[30] By the summer of 2011, Mr. Ferland had a new manager in place. The leadership of the team had changed. The employer found the grievor a new cubicle on the 8th floor of the Vanguard Building at 171 Slater Street, Ottawa. A previous cubicle at the Sir Robert Scott Building had proved unsuitable for the grievor's needs, so Mr. Ferland asked the employer's facilities manager to find him another location. During the series of moves, the grievor's chair and keyboard went missing. In the meantime, he was advised that he would be moved to the CCS, where his role would be to ensure that the commercial cargo systems were running at all times. The CCS involved less stress than the security alerts area of ACROSS. This assignment provided a major career development opportunity for the grievor, as a major software rewrite initiative was about to begin in the CCS. He was being offered the opportunity to move to a whole new software platform.

[31] These changes in location and assignment met the grievor's expressed needs. He was no longer located at 250 Tremblay Road and was not reporting to the same director or working on the same team, albeit he was still within the same division.

[32] When the grievor came back to work, the previous senior managers were no longer employed there. In addition, he was separated from the director general's office by at least three degrees. By 2012, it increased to four degrees of separation.

[33] Mr. Pitre took over managing the CCS at the beginning of fiscal year 2011-2012. The grievor was absent on sick leave at that time. Mr. Pitre took over the handling of the grievor's request for accommodation from his previous manager and Mr. Ferland. On May 17, 2011, he sent a letter to the grievor, seeking further information and clarification as to his specific restrictions and limitations and their anticipated duration and when he would be able to return to the workplace and perform the full range of his duties. The grievor's physician responded on May 24, 2011 (Exhibit 1, tab 9, and Exhibit 3, tab 9), and provided more perspective on the issues that the grievor faced. The result was that the grievor could return to work once all the necessary accommodations were in place.

[34] Mr. Pitre was aware that before the grievor's departure on sick leave, he had a workstation that had been set up to meet the requirements of an ergonomic assessment done in 2009. In addition, other changes were required to reduce what appeared to be excessive interpersonal stress. No explanation of the nature of the interpersonal stress was provided. Mr. Pitre put into place the gradual increase in work hours. The grievor was relocated, his ergonomic requirements that could be met were met and he was provided a new assignment. It took some time to find a suitable workspace, following which the remaining ergonomic changes required could be made.

[35] Despite efforts to ensure that the chair, monitor and keyboard supplied to the grievor pursuant to the 2009 ergonomic assessment would be provided to him on his return, the equipment disappeared after its arrival at the new location. It was later found and moved to the Vanguard Building before the grievor's return to the workplace.

[36] After the grievor returned to work, there were issues with his chair, which were resolved under warranty. The problems continued until the manufacturer advised the employer that a mechanism needed to be replaced. The grievor was not satisfied with

the repaired chair and demanded a new one, which was provided, and the repaired chair was used elsewhere.

[37] The reporting relationship issue raised by the grievor's physician made it clear that he could not return to work in the ACROSS area. Mr. Pitre spoke to the grievor about his options and to determine his interests. The grievor sent Mr. Pitre an email outlining his preferred options, following which Mr. Pitre explored options with his colleagues in other directorates and divisions. Mr. Pitre tried to market the grievor and spoke to directors on the client side, two of whom expressed interest. He forwarded the grievor's resume to his colleagues for their review (Exhibit 5). He forwarded the grievor's resume to his colleagues for their review and advised the grievor of their interest in employing him. However, these efforts were unproductive because the grievor never followed up to contact the directors and "sell" himself.

[38] In the end, none of these efforts was successful, and given the restrictions placed on his return by the grievor's physician, the CCS position was the only option. It was a good fit and the only opportunity within Mr. Pitre's control. Ms. Ifill was a new manager with no experience with ACROSS and whom the grievor did not know.

[39] Mr. Pitre believed this position would offer a new start for everyone involved. However, as the grievor was told, it was not intended to be a right-fit staffing exercise. A return-to-work plan was not an opportunity for the grievor to pick his job. The CCS position was within the same division but met all his needs. Sun Life was satisfied with the plan and was aware that the new position was within the same reporting structure as the grievor's position at ACROSS. However, Mr. Pitre did agree to the grievor's request that a career plan be developed for him, involving his input. This did not change the employer's position that the move to the CCS met the grievor's restrictions and constituted adequate accommodation for these restrictions; nor was it a promise of future moves.

[40] From that point, the progress of the grievor's return to work was handled by Ms. Ifill. Mr. Pitre assumed all was going well until he received the grievor's letter to Camille Theriault-Power, VPHR, CBSA, and accompanying medical certificate (Exhibit 3, tab 13) a month later. The attached doctor's note stated that the intention of her notes in November 2010 (Exhibit 3, tabs 3 and 4) was to remove the grievor from Mr. Ferland's sphere of influence. This was the first time Mr. Ferland was mentioned, following which Ms. Theriault-Power asked Ms. Boyd to become involved.

[41] Ms. Boyd asked to meet with the grievor to confirm if the employer had taken the necessary steps to address his accommodation needs. This meeting was intended to be a fact-finding discussion for which labour relations provided her a list of questions.

[42] The grievor attended the meeting with Ms. Boyd and Ms. Martel-Charest, who took notes and did not participate in the conversation. The grievor advised Ms. Boyd that he felt that there had been no dialogue about his needs and that because he was not moved out of the division in which he had worked, he had not been accommodated. He wanted a fresh start, which meant moving somewhere outside his division at a higher level. The move to the CCS was not in his opinion an accommodation. He left ACROSS as a CS-02 and returned as a CS-02 in a different building. Management had not addressed his needs, although he had been unclear as to what needs had not been addressed.

[43] Before the grievor's return to the workplace in September 2011, Mr. Pitre sought specifics from his physician as to what was required to return him to work. No mention was ever made of removing him from Mr. Ferland's chain of command. To obtain clarification of what was required, Mr. Pitre sought the advice of his labour relations advisor, who provided a consent form to be sent to the grievor's doctor (Exhibit 3, tab 23). Several attempts were made to get the signed consent form from the grievor, who refused to provide it. It appeared that the employer was seeking a fitness-to-work evaluation, not clarification of his restrictions.

[44] The grievor did eventually provide a copy of a medical release that he drafted himself. It was never used, as in Mr. Pitre's opinion, the employer had done everything it could to accommodate the grievor, and no further information was required. The grievor provided updates from his doctor on March 28, 2012, restating that a change of division was required and recommending a new ergonomic assessment be conducted of the grievor's workspace. He then contacted the CBSA's accommodations department to initiate the ergonomic assessment. A month later, the request made its way to Ms. Ifill, who approved it.

[45] On May 9, 2012, the day scheduled for the new ergonomic assessment to be conducted, the grievor left work, advising the employer that pursuant to a recent doctor's note, he would not return until he was feeling better and was provided with a cubicle that had been ergonomically set up to meet his medical needs (Exhibit 3,

tab 34). The ergonomic assessment for that day was rescheduled but could not be conducted without him present.

[46] By this time, Bradley Simon had become Acting Director of the Revenue Management Division, which included the CCS. Mr. Simon directed the grievor to provide him with a doctor's certificate to justify his absence from May 9, 2012, onwards (Exhibit 3, tab 37), to which the grievor responded that he was exercising his rights to refuse to perform dangerous work (Exhibit 3, tab 39). Subsequently, the grievor provided a doctor's note dated May 15, 2012 (Exhibit 3, tab 40), certifying that he was not to return to work until the ergonomic assessment requested was completed and the necessary changes implemented. The assessment was eventually completed on May 22, 2012.

[47] Mr. Simon directed the grievor to provide him with a doctor's certificate to justify his absence from May 9, 2012 (Exhibit 3, tab 37), to which the grievor responded that he was exercising his rights to refuse to perform dangerous work (Exhibit 3, tab 39). Subsequently, the grievor provided a doctor's note dated May 15, 2012 (Exhibit 3, tab 40), certifying that he was not to return to work until the ergonomic assessment requested was completed and the necessary changes implemented. The assessment was eventually completed on May 22, 2012.

[48] Once the employer received the ergonomist's report, it set about making the required changes. Given that the changes required could not be done in the workspace to which the grievor was assigned, a new workspace was found. Completing the changes suggested would take some time, so the grievor and Ms. Ifill began discussing the possibility of telework.

[49] Ms. Ifill took steps to secure a telework agreement, which was never completed (Exhibit 3, tab 48). There was some concern over the suitability of the grievor's home as a workplace, particularly since it did not meet the needs of the 2009 ergonomic assessment. On the recommendation of labour relations, the telework proposal was then denied.

[50] On June 8, 2012 (Exhibit 3, tab 47), Mr. Simon sent a letter, addressing the grievor's numerous concerns. As to the alleged work refusal, the employer concluded that the grievor's statements via email did not meet the requirements of the *CLC*, Part II, as the grievor was not in the workplace when he claimed his right to refuse

unsafe work. Furthermore, the time between when the grievor left the workplace and the date on which the employer received the ergonomic assessment report would be considered unauthorized leave without pay.

[51] Based on the ergonomic assessment report, and the anticipated delay in providing the equipment required, a temporary teleworking agreement was authorized, despite being previously denied by Ms. Ifill on the direction of the labour relations representative, Ms. Martel-Charest. The grievor was also advised that the recent medical certificates that he provided contained insufficient information and that further clarification would be sought from his doctor.

III. Summary of the arguments

A. For the complainant and grievor

[52] The grievor's evidence has established that he was discriminated against on the basis of disability, that the employer failed to abide by the gradual return-to-work (GRTW) program as agreed, that the employer failed to maintain a previous accommodation agreement upon the grievor's return to the workplace and that the employer deployed the grievor without his consent. All that compelled the grievor to exercise his rights to refuse unsafe work pursuant to Part II of the *CLC*.

[53] The grievor suffers from a disability that requires accommodation. The test as elaborated in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, ("*O'Malley*") is whether the employer knew or ought reasonably to have known that the employee required accommodation. The grievor's employer did not contest the evidence of his disability and his need for accommodation. However, the employer has failed to prove that undue hardship prevented it from accommodating him. By acting as it did, the employer violated the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; "the *CHRA*").

[54] The grievor has demonstrated that the employer representative assigned to advise management on matters related to the grievor's accommodation request, Ms. Martel-Charest, a senior labour relations advisor, engaged in reckless acts that showed a total disregard and lack of consideration for the grievor and for the employer's legal obligations to accommodate him. The pejorative terms musketeer and Musketeer T., used to describe the grievor, were offensive and caused him

embarrassment. That use also demonstrated that the employer did not take his needs seriously.

[55] Furthermore, when the employer implemented the grievor's accommodation needs, it did not do so in a timely fashion. The Board must decide not whether any one step in the accommodation process was unreasonably delayed but whether the overall process was unreasonably delayed. If unreasonable delay in found, the Board must proceed to consider whether the employer was responsible for that overall delay, as that would constitute a failure to meet its duty to accommodate under the collective agreement and the *CHRA*. To determine this, the evidence of the whole process must be considered.

[56] The grievor testified that his accommodation requests date from November 2010 and that they were not addressed, resulting in his doctor placing him off work on December 8, 2010. The employer sent a medical questionnaire to his doctor, which was filled out and returned. The employer asked no further questions. During this period, the grievor remained off work even though the employer knew that he was able to return to work early in 2011 if the accommodations were put in place. Eventually, Sun Life representatives became involved in developing a GRTW plan, which was signed by all parties.

[57] According to the grievor's evidence, the employer did not follow the agreement. His doctor had to submit more and more requests to the employer to meet the grievor's accommodation needs. The employer could not implement the GRTW plan because it did not provide him with the ergonomic accommodations that were already in place before he left the workplace in 2010. The employer knew that he would be returning as early as April 2011 but did not have the requirements of his previous accommodation in place until January 2012.

[58] The grievor's most recent ergonomic assessment was conducted in his cubicle at 250 Tremblay Road in 2009. Since his return to work in September 2011, the grievor has had three cubicles, none of which has been identical in setup to the one in which he was assessed at 250 Tremblay Road. On May 14, 2012, the grievor reminded the employer that his doctor and specialist had requested an ergonomic assessment of his current cubicle on March 20 and April 13, 2012. On June 8, 2012, the employer acknowledged that the ergonomic assessment completed on May 22, 2012, required

the purchase of specific furniture; consequently, a temporary telework arrangement was concluded.

[59] Mr. Pitre testified that on March 14, 2012 when the employer requested a fitness to work evaluation, there was no confusion about the grievor's accommodation needs and restrictions. At issue is the employer's failure to clearly communicate to the grievor what additional information it required. Mr. Pitre requested that the grievor sign a consent form to allow the employer to seek clarification from his specialist. According to Mr. Pitre, he was directed by labour relations to request that the grievor undergo a fitness-to-work evaluation. While the grievor was willing to consent to allow the employer to seek clarification from his physician, he was unwilling to consent to a fitness-to-work evaluation.

[60] The employer did not in fact seek clarification from the specialist. On March 27, 2013, Mr. Pitre confirmed that the employer was satisfied that all the grievor's accommodation needs were met and that the GRTW of September 2011 had been met. The grievor disagreed that his needs were met.

[61] The Supreme Court of Canada has accepted that the duty to accommodate has both a procedural and a substantive component. The procedural component requires the employer to take steps to understand the employee's needs and to undertake an individualized review of potential measures to satisfy these needs. The substantive component considers the reasonableness of the accommodation offered or the employer's reasons for not providing the required accommodation. The employer bears the onus of demonstrating what considerations, assessments and steps were undertaken to accommodate the employee to the point of undue hardship (see *Vargas v. University of Waterloo*, 2013 HRTO 1161), which the employer did not demonstrate in this case. By failing to take steps to accommodate the grievor, the employer in this case acted recklessly and discriminated against him.

[62] With respect to the question of the alleged deployment to the CCS, the grievor contends that it was forced. The evidence demonstrated that Mr. Pitre and Ms. Ifill knew nothing of the grievor and had never seen his resume, which was sent to Mr. Ferland in April 2011. The grievor objected to the position to which he was deployed as he was not qualified for it and it was still under the leadership of Mr. Ferland. Mr. Pitre did not have the authority to move the grievor outside the

Solutions Directorate; nor did he raise the grievor's objections with Mr. Ferland's superiors.

[63] On the issue of the remedies being sought, the grievor referred the Board to the decisions in *Johnstone v. Canada Border Services*, 2010 CHRT 20, *Richards v. Canadian National Railway*, 2010 CHRT 24, and *Audet v. Canadian National Railway*, 2006 CHRT 25, are comparisons against which the assessment of damages to be paid to the grievor may be made. He sought $20 000 for pain and suffering and an additional $20 000 as special damages. It should be noted that the Federal Court of Appeal reversed the Tribunal's remedial order in *Johnstone* but only with respect to certain other remedies (see *Canada (Attorney General) v. Johnstone*, 2014 FCA 110). The Court specifically affirmed, at paras. 123-125, the Tribunal's award for special compensation under subsection 53(3) of the CHRA.

[64] In relation to his allegation of retaliation for having exercised his rights under Part II of the CLC, the grievor points out that on May 9, 2012, the grievor advised Ms. Ifill via email that he did not feel well and that he was leaving the workplace. He would return only when his cubicle was ergonomically assessed and he was feeling better. His intentions to refuse unsafe work were sufficiently clear and in conformity with his right to refuse to work pursuant to section 128 of the *CLC*. There is no magic word or standard formula to sufficiently and properly convey a refusal to work (see *Simon v. Canada Post Corp.* (1993), 91 di 1) (C.L.R.B.)(QL)).

[65] The evidence clearly indicated that during the period when the grievor refused to work, he had reasonable grounds to believe that a condition in the workplace existed that constituted a danger to him. He discharged his onus of proving that his refusal to work was based on genuine safety concerns (see *Canada Post Corp. v. Jolly* (1992), 87 di 218)(C.L.R.B.)(QL)). On May 24, 2012, the employer advised the grievor that his absence would be considered an unauthorized leave, for which he would not be compensated. Between the initial refusal to work and the employer's final determination that the grievor did not respect the provisions of section 128 of the *CLC* in its letter of June 8, 2012, the grievor attempted to provide additional clarification requested by the employer.

[66] The unpaid leave instituted by the employer was a financial penalty against the grievor for having invoked his rights under Part II of the *CLC*. By virtue of

subsection 133(6) of the *CLC*, the employer had the onus of proving that the alleged violation did not occur, which it did not do.

B. <u>For the respondent and employer</u>

[67] The grievor submitted that he adduced evidence in support of his allegations that he was discriminated against on the basis of his disability, that the employer failed to abide by a previous accommodation agreement upon his return to work, that it deployed him without consent and that it disciplined him for exercising his right to refuse dangerous work under Part II of the *CLC*.

[68] The onus was on the grievor to prove a *prima facie* case of discrimination. Once done, the burden would shift to the employer to provide a reasonable explanation demonstrating that the alleged discrimination either did not occur as alleged or that the conduct was somehow non-discriminatory or justified (see *Canada (Attorney General) v. Sketchley*, 2005 FCA 404, at para 86, and *Maillet v. Canada (Attorney General)*, 2005 CHRT 48, at para 4).

[69] The grievor had to establish that he has a disability captured by the *CHRA*, that he suffered adverse treatment in the workplace and that his disability was a factor in the adverse treatment he received. The grievor's disability need not be the only factor, or even the primary factor for discrimination to be established. The employer would then have the onus to establish on a balance of probabilities that its decision did not constitute discrimination because the disability was not capable of being accommodated in the workplace without undue hardship (see *O'Malley*).

[70] The search for a suitable accommodation is a multi-party process, which in the case of disability requires the employee to facilitate the search for meaningful accommodation but to respond to the employer's reasonable requests for relevant medical information concerning his or her limitations, to allow the employer to initiate a proposal.

[71] The jurisprudence has established that an employee cannot dictate to an employer the precise terms of an accommodation. If the accommodation process fails because the employee does not cooperate, his or her complaint must be dismissed. The employee cannot expect a perfect accommodation or solution. There is no duty of instant or perfect accommodation, only reasonable accommodation (see *McGill*

University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, 2007 SCC 4, at para 22; *Tweten v. RTL Robinson Enterprises Ltd.*, 2005 CHRT 8; *Graham v. Canada Post Corporation*, 2007 CHRT 40, at para 91 to 94; and *Hutchinson v. Canada (Minister of the Environment Canada),* 2003 FCA 133, at para 77).

[72] An employee seeking accommodation has a duty to cooperate with the employer by providing information as to the nature and extent of the alleged disability sufficient to allow the employer to determine the necessary accommodation. To facilitate the search for reasonable accommodation, the grievor had to do his part. Concomitant with the search for a reasonable accommodation is a duty to facilitate the search for such an accommodation. To determine if the grievor has met his obligations, his conduct must be considered (see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970) ("*Renaud*"). When the employer has initiated a proposed accommodation, which if implemented would fulfill the duty to accommodate, the grievor has a duty to facilitate the implementation of the proposed accommodation.

[73] In the present case, the grievor provided two conflicting and confusing medical notes from his doctor, in November 2010 (see Exhibit 3, tabs 3 and 4). The first identified the need for the grievor to report to a different division immediately and for the employer to minimize discrimination and stigmatization and to effectively address, as well as possible, stressors in the workplace and foster a healthy work environment. It stated that it seemed that the degree of interpersonal stress in the grievor's then-current workplace was putting him at high risk of developing a disabling medical condition. The second note simply recommended that the grievor be transferred to a different work environment on a team that reported to a different director, for urgent medical reasons.

[74] Mr. Ferland testified that from his perspective, he had two distinct and conflicting medical notes. The notes were confusing and unhelpful to the employer understanding the grievor's limitations and how to accommodate them. He had not made any allegations against anyone at the CBSA of harassment or discrimination or that he had been stigmatized, and yet the doctor's first note recommended a change of division to minimize those things. Therefore, it was necessary for the employer to write the grievor's physician to obtain clarification, as it was entitled to do.

[75] The employer asked specific questions of the doctor in order to determine the grievor's limitations and restrictions so that an appropriate accommodation in the workplace could be found (see Exhibit 3, tab 5, and *Christiano v. Grand National Apparel Inc.*, 2012 HRTO 991, at para 19).

[76] The subsequent two notes provided by the grievor's physician were also of limited assistance in advancing the accommodation process (Exhibit 3, tab 5). In one, she advised the employer that the grievor would be off until January 2011, and in the second, she indicated that in light of her most recent medical assessment and the complex nature of the grievor's condition, she was not able to respond to Mr. Ferland's letter. In January 2011, she recommended that the grievor remain on medical leave until mid-May of that year. According to the grievor, this was due to the employer's inaction in properly accommodating him. The doctor was not called to testify at the hearing and did not corroborate the grievor's statement. Furthermore, nothing in her medical notes indicate that this was the case.

[77] A new director, Mr. Pitre, was appointed in April 2011, before the grievor's return to the workplace. There were emails between the grievor, Mr. Pitre and Mr. Ferland as early as April 2011. From these emails, it is clear that the grievor believed and in fact continues to believe that the employer should have relied on the November 2010 medical note for accommodation purposes, even though he had been out of the workplace since December 6, 2010, and the doctor's statement in her December 8, 2010 note, that she would supply further recommendations to the employer.

[78] Only after the employer wrote to the grievor's physician in May 2011 did it receive additional information, which was again unclear. It contained general statements that were of no assistance to the employer, such as recommendations related to social environmental restrictions, which recommended that the employer reduce ". . . what appear to be excessive personal stress, conflict . . ." and that the employer pay ". . . attention to creating a 'healthy' social environment that allows work to be focussed [*sic*] on fulfilling expectations and requirements . . ." (see Exhibit 1, tab 9).

[79] The physician also stipulated that she could not advise the employer on what the workplace could or could not do and recommended the assistance of a rehabilitation specialist (rehab worker) to determine the most feasible way to permit a

timely return to work (see Exhibit 1, tab 9). This note made clear that discussions with the grievor's insurance carrier, Sun Life, would be required and that certain measures would need to be put in place before the employee could return to work.

[80] The rehab worker proposed that the employer provide a change of location, team and reporting to permit the grievor a "fresh start". There was no mention of the grievor having to report to another division or directorate (see Exhibit 1, tab 9).

[81] The employer acknowledged that there were delays in putting the 2009 ergonomic accommodations back in place. There were difficulties finding an appropriate office location, and some of the grievor's office equipment went missing during the relocation process. According to Mr. Pitre, there were numerous issues, and the whole process was a "nightmare". In addition, the grievor's chair needed to be repaired, on which the employer took immediate action. When it could not be repaired, it was replaced, all of which took additional time.

[82] Mr. Pitre invited the grievor to a return-to-work meeting held on September 7, 2011, to discuss his return-to-work plan. Also in attendance were his bargaining agent representative and his Sun Life rehab worker.

[83] At that meeting, the employer proposed that the grievor report to Ms. Ifill within the CCS workgroup. This proposal met all the requirements identified by his physician and Sun Life. It provided him with a change of location and team and a different reporting relationship (see Exhibit 3, tab 10). Neither the rehab worker nor the grievor's bargaining agent representative raised any objections to the employer's plan. The grievor signed the return-to-work plan, which Mr. Pitre acknowledged was not the final statement. Changes might have been required as things went along.

[84] The employer submitted that it provided the grievor with reasonable accommodation. Reporting within the CCS workgroup might not have been the grievor's preferred solution, but it was a solution that met his needs and provided for a smooth return to work. The employer also submitted that the grievor failed to facilitate the implementation of the return-to-work plan. His actions led to the reasonable accommodation floundering and contributed to the breakdown in communication, thus further hindering the accommodation process. After only one month into the return-to-work process, the grievor wrote to the CBSA's VPHR, including a sealed note from a different physician, Dr. Henry (see Exhibit 3, tab 13). In

his letter, the grievor alleged that the CBSA was not following the return-to-work agreement and provided a rendition of his version of events.

[85] Dr. Henry's note stated that the intent of the restrictions in the return-to-work agreement was to remove the grievor from Mr. Ferland's sphere of influence. This is not supported by the GRTW plan prepared by Sun Life, which identified only a change of work team, reporting structure and location (see Exhibit 3, tab 10). Instead, Dr. Henry based her recommendations on the requirement that the grievor have a work/career plan to optimize matching his skills and goals.

[86] Following the VPHR's receipt of the grievor's letter, the employer again tried to ascertain his limitations and restrictions. Ms. Boyd was tasked with a fact-finding mission into the allegations in his letter. She concluded that in light of the information provided to her, the medical information provided by the grievor's physicians was unclear as to his actual functional abilities and whether a medical condition existed that required accommodation. She recommended that the employer seek further clarification from the grievor's physicians concerning his medical needs and the basis for any recommended workplace accommodations (see Exhibit 3, tabs 15 and 17).

[87] What followed was a general disagreement between the employer and the grievor about the accommodation process. As a result, there was a breakdown in communications, for which the grievor must share the blame. This culminated in the employer's decision to write to Dr. Henry to advise her that her most recent note did not provide sufficient information pertaining to the additional proposed changes to the workplace and that no further accommodations would be provided on the basis of the existing medical information (see Exhibit 3, tab 27).

[88] The breakdown in the accommodation process was further evidenced by the confusion in granting the grievor's request for an updated ergonomic assessment, as required by his physician. Mr. Pitre left the division during this period, and a new manager, Mr. Simon, took over. The employer did agree to carry out the ergonomic assessment of the grievor's new work location within two months of receiving the physician's first request. His grievance related to the employer's delay in approving the ergonomic assessment was allowed in part at the final level, and he was granted leave with pay for the period from May 10, 2012, to June 22, 2012.

[89] The grievor failed to demonstrate that he had a disability captured by the *CHRA* that required he be moved outside of Mr. Ferland's jurisdiction. He also failed to demonstrate that he had suffered adverse treatment in the workplace due to this disability and that this disability was a factor in the adverse treatment he received. The grievor has failed to establish a *prima facie* case of discrimination. The employer submitted that it met its duty to accommodate to the point of undue hardship and that it did not unreasonably delay the accommodation process.

[90] The grievor did everything he could to impede the implementation of the GRTW, which was agreed to by all the stakeholders. He did not facilitate the search for meaningful accommodation by responding to reasonable requests from the employer to provide relevant medical information concerning his limitations and restrictions. Rather, he attempted to dictate to the employer through medical notes the precise terms for his accommodation preferences. His actions led to the breakdown in communication that delayed the accommodation process.

[91] Subparagraph 209(1)(*c*)(ii) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *PSLRA*") grants the Board jurisdiction to deal with individual grievances relating to deployment without consent under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"), when consent is required. The word "deployment" in the *PSLRA* has the same meaning as under the *PSEA* (see *Canada (Attorney General) v. Dawidowski*, [1994] F.C.J. No. 1791 (QL)). The *PSEA* defines deployment as the transfer of a person from one position to another, in accordance with Part 3 of the *PSEA*.

[92] In *Dawidowski*, the Federal Court stipulated that to support a conclusion that an employee had been deployed, the Board must find a subjective element (the intent to deploy) and an objective element (compliance with the conditions set out in the *PSEA* and Treasury Board directives; see para 11). The Federal Court rejected the notion of a "*de facto* deployment," as that could result in employees being deprived of their statutory rights and safeguards, a result that Parliament clearly had not intended.

[93] The Public Service Labour Relations Board has held that the *Dawidowski* decision stands for the proposition that deployments recognized under the *PSEA* are only those in which the department intended to make a deployment and complied with any pertinent conditions in statutes, regulations or guidelines (see *Yarney v. Treasury Board (Department of Health)*, 2013 PSLRB 45).

[94] The grievor adduced no evidence that he was transferred from his position in ACROSS to another position in the CCS. In fact, he testified that his position in ACROSS was moved to the CCS, which was confirmed by the employer's evidence that he continued to have the same position number in both places. There is no evidence of the employer's intent to deploy the grievor to another position or of it having complied with CBSA staffing policies regarding deployments. The return-to-work plan clearly mentions that the grievor was to be assigned to the CCS team (see Exhibit 3, tab 10). The Board does not have jurisdiction to deal with this matter as the grievor was not the subject of a deployment without his consent.

[95] Any actions taken by the CBSA do not correspond to a violation of section 147 of the *CLC*. The grievor was not seeking the enforcement of a right under the *CLC*, and there was no nexus between the employer's alleged reprisals and the enforcement of a right under the *CLC*. Disagreements about the duty to accommodate, although related to workplace safety, do not amount to a *prima facie* case of reprisal (see *Davies v. Honda of Canada Manufacturing,* 2012 CanLII 78331 (ON LRB).

[96] As in the *Honda* case, the nub of the dispute is the interpretations of the grievor's medical restrictions. There was a fundamental disagreement about his ability to report to Mr. Ferland and the need for a new ergonomic assessment. On the day of the alleged work refusal, the grievor was scheduled for an ergonomic assessment. He emailed his manager, indicating that he was not feeling well and that he was going home. Consequently, the ergonomic assessment could not be completed that day and had to be rescheduled. He indicated to his shop steward that he would return to work when he felt better and when he had been provided with an ergonomically assessed work area with all the required changes implemented that were noted in the report (see Exhibit 3, tab 34).

[97] In his complaint, the grievor raised the same issues he had raised in his grievances, in particular that the employer failed to complete the ergonomic assessment of his workstation. He also notes in his complaint that he filed a grievance on this issue. The complaint does not make any reference to any specific right that has been breached by the employer; nor does it establish a link between any of the rights under section 147 of the *CLC* and the alleged act of reprisal. The complaint instead refers to corrective action being sought under section 134 of the *CLC*. The complaint provided no details about any health and safety risk that he was attempting to prevent.

[98] Although there was disagreement about the grievor's capabilities, this does not constitute a *prima facie* breach of the *CLC*. There was no evidence adduced at the hearing about the conduct of a disciplinary investigation. The grievor was never subject to any disciplinary action or measures or any disciplinary investigation. Compensation was withheld from him during a period in which he was determined absent from the workplace without authorization. The leave without pay for this period was later replaced with leave with pay (see Exhibit 3, tab 42).

IV. Reasons

[99] The grievor has alleged that the employer discriminated against him in relation to his disability, in violation of the *CHRA*, article 43.01 of the CS Group Collective Agreement, as well as Treasury Board and CBSA policies regarding the accommodation of employees with disabilities.

[100] Article 43.01 of the collective agreement provides that there shall be no discrimination exercised or practiced with respect to an employee by reason of mental or physical disability, amongst other grounds.

[101] According to s. 226(2)(a) of the *PSLRA*, an adjudicator or the Board may, in relation to any matter referred to adjudication, interpret and apply the *CHRA* (other than its provisions relating to equal pay for work of equal value), whether or not there is a conflict between the *CHRA* and the collective agreement, if any.

[102] Section 7 of the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (subsection 3(1) of the *CHRA*). Section 25 of the *CHRA* defines disability as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[103] In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination. A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*O'Malley* at para. 28)). The Board cannot take into consideration the employer's answer before determining whether a *prima facie* case of

discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 22).

[104] An employer faced with a *prima facie* case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory; or, by establishing a statutory defence that justifies the discrimination (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13). If a reasonable explanation is given, it is up to the grievor to demonstrate that the explanation is merely a pretext for discrimination (see *Maillet* at para. 6).

[105] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the claim of discrimination to be substantiated. The grievor need only show that discrimination is one of the factors in the employer's decision (see *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.) at para. 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence)*, 1996 CanLII 4067 (FCA), [1996] 3 FC 789).

[106] As I explain below, I find that although the grievor has established a case of discrimination on a *prima facie* basis, the employer has presented a reasonable explanation and as a result, the grievor's claim is not substantiated.

[107] There is no dispute that the grievor has a disability. According to his evidence, upon his return to work in September 2011, he discovered that the ergonomic changes to his cubicle were missing. These modifications included the use of a specific chair and keyboard as well as dual monitors. The grievor was relocated four times in eight months, but none of the cubicles to which he was assigned was set up to meet with his needs, as set out in the ergonomic assessment that had been prepared in 2009. The required equipment was also often missing.

[108] Furthermore, he maintains that he was reassigned to an unsuitable position with the CCS team. In his view, this was a different job with different roles and responsibilities than he had in the position that he held at ACROSS prior to taking his medical leave in December 2010. The aggravation he encountered in relation to this new position, compounded by his ill-suited cubicle and ongoing accommodation issues caused him great frustration. It unsettled him, which made it difficult for him to integrate.

[109] These factors all served to prevent him from being able to perform his work properly. In relation to the issues with his cubicle, he proposed working from home as a solution. This suggestion was declined. Finally, when he was to be moved to another cubicle in June 2012 in which yet again his required equipment was missing, he states that it became clear that the employer was not complying with the occupational therapist's ergonomic assessment and recommendations, and that these lapses posed an occupational health and safety threat to him, as a result of which he felt he could no longer continue to work in the existing circumstances.

[110] Finally, in the fall of 2012, the employer implemented all of the recommendations and all of the grievor's ergonomic issues were addressed, enabling him to perform his work without any obstacles.

[111] Applying the *O'Malley* test, I find that this evidence, if believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent. His evidence would show that he is disabled and that within the environment that the employer provided him, his disability was an obstacle to his performing his work and eventually led to his having to exercise his right to refuse work under the *Canada Labour Code*. Accordingly, the grievor has established on a *prima facie* basis that he was adversely differentiated in his employment on the basis of his disability.

[112] I find, however, that the employer has provided a persuasive answer to the grievor's *prima facie* case, namely that it in fact successfully accommodated the complainant's needs after his return to work in September 2011. This constitutes a reasonable explanation and any delay that may have occurred in the implementation of the accommodation is attributable to the grievor.

[113] In particular, I find that the delay in the employer's ability to retrofit a cubicle to accommodate the grievor's physical disability was caused by his lack of cooperation in securing the necessary medical information. Had he signed the authorization to undergo a fitness-to-work evaluation when requested, rather than communicate back and forth with the employer over what information he would authorize to be released, this issue would not have further delayed the identification and clarification of his needs. Had he not provided conflicting medical notes, further clarification might not have been required. Had he stayed at work on May 9, 2012, long enough to have the ergonomic assessment scheduled for that day completed, it would not have been

further delayed. The grievor thus caused the delay in the implementation of this part of the accommodation.

[114] As the Supreme Court of Canada noted in *Renaud* at para. 43, employees seeking accommodation have a duty to cooperate with their employer by providing information as to the nature and extent of the alleged disability that will enable the employer to determine the necessary accommodation. The grievor failed to properly fulfill this duty.

[115] It is clear that the grievor was irritated with the tasks to which he was assigned at CCS and this may have unfortunately played a role in his reluctance to cooperate. However, the grievor's physician provided a medical opinion that he go to another division, with which the employer fully complied by ensuring that he would be removed from the ACROSS division and isolated from the director general level, as suggested by Dr. Henry. This was apparently not the placement that the grievor would have preferred, and once he made his opinions known on this point, Mr. Pitre conveyed the grievor's interest in working in other divisions and directorates to managers there, but the grievor himself failed to follow up and "sell" himself to them. Nevertheless, the employer was ultimately not required to move the grievor elsewhere. The position at CCS satisfied the accommodation requirements that the physician had defined. This was a reasonable accommodation as there is no requirement on employers to provide a "perfect accommodation" (see *Andres v. Canada Revenue Agency*, 2014 PSLRB 86 at para. 89.)

[116] The employer has thus provided a reasonable explanation demonstrating that the grievor was in fact fully accommodated. While the accommodation might not have been perfect, it met the grievor's limitations and was reasonable. The grievor's allegations that the employer engaged in a discriminatory practice have therefore not been substantiated.

[117] As for the issue of the alleged deployment, the grievor claimed that he was deployed to the CCS position without his consent. The employer's representative correctly identified the test for determining whether a deployment occurred. The *Dawidowski* case requires that two elements be established to support a claim of deployment: the intention to deploy, and compliance with the conditions set out in the *PSEA* and Treasury Board directives. In accommodating employees' disabilities, employers are not required to follow staffing rules and regulations, which in my

opinion negates the objective element of the *Dawidowski* test as it falls outside of the normal staffing process. Furthermore, the fact that the grievor remained in the same position number further negates the objective element. The grievor has not established either of the elements required for me to have jurisdiction over the question of deployment as set out in section 231 of the *Act*. He has not established that his consent was required. Even if he had, the deployment would not have happened without his consent in the form of his agreement, and those of his rehab specialist and bargaining agent representative, to the GRTW.

[118] As to the question of whether the grievor was the subject of disciplinary action as a result of his refusal to perform unsafe work, the grievor's representative is correct that no specific wording is required by which to notify the employer that the grievor was invoking his rights under the *CLC*. However, the grievor did not claim these rights on May 9, 2012. He merely advised his manager that he was not feeling well, was leaving the workplace and would return only once he was provided with a suitably equipped cubicle. The grievor did not assert his rights under the *CLC* until his later communication with the employer's occupational health and safety representative, when he was no longer in the workplace. That was not the correct process for asserting one's rights to refuse unsafe work.

[119] The employer was required to address the grievor's absence from the workplace and chose to do so in the form of an unauthorized leave without pay. In my opinion, this was an administrative and not a disciplinary measure. I must note that this was subsequently changed at the final level of the grievance process and that the grievor was allowed special paid leave for the period in question, so he was not without pay in the end.

[120] The grievor seeks damages for the pain and suffering and embarrassment he suffered as a result of the musketeer and Musketeer T. references the labour relations representative used in her communications throughout the accommodation process. He hs provided no evidence upon which to assess the degree of the impact of these comments. Mr. Ferland and Ms. Boyd testified that in their opinion, these comments were inappropriate and unprofessional. Mr. Ferland testified that he hired a mentor to work with the labour relations officer to assist her in her professional development. I agree that the comments were inappropriate as indicated by Mr. Ferland and am satisfied that the employer took the appropriate action to address this unacceptable

behaviour. There has been no link established between the impact of these comments, and any impact on the grievor during this process. He was unaware that the comments had been made until after he received the results of an access to information request filed after this grievance. It cannot be said that he suffered embarrassment during the process when he was completely unaware.

[121] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[122] Complaint 560-02-086, alleging that the grievor was disciplined, in contravention of section 147 of the *CLC*, is dismissed.

[123] Grievance 566-02-8065, alleging that the employer failed to accommodate the grievor, in violation of the collective agreement and the *CHRA*, is dismissed.

[124] Grievance 566-02-8064, alleging that the employer delayed the implementation of a GRTW agreement and that it discriminated against the grievor, in contravention of the collective agreement and the *CHRA*, is dismissed

[125] Grievance 566-02-8066, alleging that the grievor was deployed to a position without his consent, is dismissed.

[126] Grievance 566-02-8067, alleging that the employer failed to provide the required equipment to the grievor and that it failed to implement a GRTW agreement, in violation of the collective agreement and the *CHRA*, is dismissed.

January 29, 2015.

Margaret T.A. Shannon,
a panel of the Public Service Labour Relations Board and adjudicator